KEMPAS (M) BHD.

v.

R. KANDASAMY

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[CIVIL APPEAL NO. 109/79]
25 MARCH 1982

LABOUR LAW: *Leave to quash Industrial Court award - Whether exceeded its jurisdiction in ordering reinstatement of employee to a higher grade than he occupied when his services was terminated.*

In this case, the respondent who was employed as a daily paid trainee conductor by the applicant had his services terminated by a notice dated 20 March 1975. As the respondent was dissatisfied with the termination of his employment, he made a representation to the Minister who then referred it to the Industrial Court. The Industrial Court in holding that the dismissal was without just cause or excuse ordered that the respondent be appointed from 1 April 1975 as a confirmed grade 3 conductor on the estate or on any other estate managed by the applicant's agents at the minimum of grade 2 commencing him at RM235 a month basic. The Industrial Court also ordered the applicant to pay wages to the respondent for the material period based on the "reinstatement" order and also gave other subsidiary connected reliefs.

The applicant challenged the award on the grounds *inter alia* that the Industrial Court considered matters outside the reference in coming to its conclusion and the order of reinstatement was bad and invalid and contrary to s. 16A of the Act and exceeded the jurisdiction conferred on the Industrial Court. It was argued on behalf of the respondent that s. 30(6) of the Act gave sufficient powers to the Industrial Court to make such an order.

Held:

[1] The Industrial Court went beyond its jurisdiction in making the order purporting not to reinstate the respondent to his previous employment but in effect promoting him to a post of a higher grade.

[2] The order of the Industrial Court directing the employment of the respondent to a position of a higher grade which he never occupied before cannot by any stretch of imagination be construed as a reinstatement to his former employment. There was noting to prevent the Industrial Court to order compensation *in lieu* of reinstatement if it considered reinstatement not an appropriate order. But this the Industrial Court did not do.

[3] Section 30(6) is a general direction to the Industrial Court in conformity with the direction to act according to equity and good conscience and the substantial merits of the case without regard to technicalities or form. These general directions, however, cannot override the specific nature of the relief provided in s. 16A of the Act.

[4] The Industrial Court cannot, purporting to act under s. 30(6) of the Act, make an order beyond reinstating the workman if it considers reinstatement the proper relief. To do so would render meaningless the words "reinstate in his former employment" in s. 16A of the Act.

[5] The award is so far as it purports to direct the respondent to be emplaced in a position of employment which position he never held on 20 March 1975 is invalid as exceeding jurisdiction as are the consequential order of the Industrial Court. The rest of the award is valid.

[Order accordingly. Costs to the applicant.]

Cases referred to:
Craigiela Estate case [1977] FC APP 61
Powell, Duffryn, Ltd. v. Rhodes [1946] All ER 666
Singapore Insurance Companies Employees' Union v. Insurance Company of North America [1967] MLJ xxii
Dr. A.Dutt v. Assunta Hospital [1981] MLJ 304

Legislation referred to:
Industrial Relations Act 1967, ss. 16A, (1), (9), 17A, 20, 30(6)

For the applicant - V.T. Nathan
For the respondent - B.P. Xavier

JUDGMENT

Hashim Yeop Sani J:

This notice of motion has taken a long-winded course. On 14 April 1978 leave was obtained from the High Court for a motion to quash Industrial Court award no. 105/77. When the substantive motion came to be heard by the High Court on 5 April 1979, the applicant company raised a preliminary point, the point being that the reference by the Minister to the Industrial Court was bad and invalid and consequently the award of the Industrial Court was also null and void. The High Court upheld the preliminary objection but on appeal to the Federal Court that decision was reversed. So the substantive motion came before the High Court for the second time.

First, some background facts. The respondent was until the notice dated 20 March 1975 purporting to terminate his service a daily paid trainee conductor employed by the applicant company. The respondent being dissatisfied with the termination of his employment made a representation under the old s. 16A of the Industrial Relations Act 1967. The Minister then referred the matter to the Industrial Court under sub-section (9) of the section.

The Industrial Court handed down award no. 105/77 on 12 October 1977. The Industrial Court after examining the facts came to the conclusion that the purported termination of the employment of the respondent was motivated by the displeasure of the manager of the applicant company. In other words the Industrial Court held that the respondent had been dismissed without just cause or excuse. In the award the Industrial Court ordered that the respondent "should now stand appointed, not promoted from 1 April 1975, as a confirmed grade III conductor on the estate or on any other estate managed by the agents for the company at the minimum of grade II commencing him at RM235 a month basic, bearing in mind that the amount of compensation awarded is based not on contractual loss but on what is 'just and reasonable'." The Industrial Court then directed the applicant company to pay wages to the respondent for the material period based on the "reinstatement" order and also gave other subsidiary connected reliefs.

The challenge on the award by the applicant company was to two pronged.

Firstly, it was submitted that the Industrial Court considered matters outside the reference in coming to its conclusion and in particular relied on a ruling made in award no. 4 of 1970 which was subsequently disapproved by the Federal Court. It was based on this ruling that the Industrial Court in the instant case ordered the "reinstatement" of the respondent to a higher grade than he occupied when his services was terminated.

Looking at the award in the instant case it is my opinion that the issues considered by the Industrial Court were issues either contained in or relevant to the statement and the reply as submitted to the Industrial Court. In fact all these inquiries were necessary to enable the Industrial Court to make its various findings in the award.

In the *Craigiela Estate* case (Federal Court Civil Appeal No: 61 of 1977) the Federal Court gave a guide line how to determine whether the Industrial Court had exceeded jurisdiction or not as follows:

> To consider the question whether or not the Industrial Court had jurisdiction or had exceeded it, we must consider the issues before it, and to do this it is necessary to look at the written case for the employees (at p. 75 of the appeal record) and the estate's written reply (at p. 80) submitted to the Industrial Court.

In my opinion in coming to its conclusion the Industrial Court did not commit any jurisdictional errors.

Secondly, and in the alternative it was the contention of the applicant company that the order of reinstatement in the award was bad and invalid in so far as the award purported to order that the respondents be emplaced in a position of employment he never occupied prior to his termination of service. The order was therefore according to the applicant contrary to the provision of s. 16A of the Act and exceeded the jurisdiction conferred on the Industrial Court.

The old s. 16A subsequently became s. 17A and was then re-enacted as s. 20 of the Act. Section 16A(1) of the Act then read as follows:

> (1) Where a workman considers that he has been dismissed without just cause or excuse by his employer, ... he may, within one month of such dismissal, make representations in writing to the Minister to be reinstated in his former employment.
> (Emphasis mine).

As can be seen in the language of the old s. 16A(1) if the workman considers himself to have been dismissed without just cause or excuse he may make representation to be reinstated in his former employment. When the Minister referred to dispute under sub-section (9) of s. 16A of the Industrial Relations Act he referred such dismissal and such representation to the Industrial Court for settlement.

In *Powell, Duffryn, Ltd. v. Rhodes* [1946] All ER 666, the word "reinstatement" was examined. There an employee claimed that he was entitled to be reinstated in his employment and that claim to reinstatement meant being put back in the same position as he was before his dismissal. Lord Goddard said at page 667 -

> I think that 'position' means, not only the grade in which he was working, but the place at which he was working.

In other words to reinstate means to put an employee back in the place he was working before. As Croom-Johnson J said in the same case reinstatement "means what it says".

This line of thinking would seem to have been followed in *Singapore Insurance Companies Employees' Union v. Insurance Company of North America* [1967] MLJ xxii. There it was held by the Singapore Arbitration Court that:

> (1) 'To reinstate', as applied to an employee who has been dismissed involved putting that employee back, in law and in fact, to the same position he was occupying in the company before his service was terminated by his employer or alternatively it is the duty of an employer as far as practicable, to provide him with work, the responsibility and character of which would be comparable to that of the position he held before dismissal,

It seems to me quite clear that the Industrial Court in the instant case went beyond its jurisdiction in making the order purporting not to reinstate the respondent to his previous employment but in effect promoting him to a post of higher grade. The error which found its root in the ruling made earlier in Industrial Court award no. 4 of 1970 could well be an error made within jurisdiction and I believe it was. But the order of Industrial Court directing the emplacement of the respondent to a position of a higher grade which he never occupied before cannot by any stretch of imagination be construed as a reinstatement to his former employment. There was nothing to prevent the Industrial Court to order compensation *in lieu* of reinstatement if it considered reinstatement not an appropriate order. See *Dr. A. Dutt v. Assunta Hospital* [1981] MLJ 304. But this the Industrial Court did not do.

It was argued on behalf of the respondent that s. 30(6) of the Industrial Relations Act gave sufficient powers to the Industrial Court to make such an order. Section 30(6) of the Act provides that in making its award the Industrial Court shall not be restricted to the specific relief claimed but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the dispute or reference.

In my opinion s. 30(6) is a general direction to the Industrial Court in conformity with the direction to act according to equity and good conscience and the substantial merits of the case without regard to technicalities or form. These general directions, however, cannot override the specific nature of the relief provided in s. 16A of the Act. The Industrial Court cannot, purporting to act under s. 30(6) of the Act, make an order beyond reinstating the workman if it considers reinstatement the proper relief. To do so would render meaningless the words "reinstate in his former employment" in s. 16A of the Act.

In other words Industrial Court award no. 105/77 is partly valid and partly invalid, and these parts are severable. In my opinion that part of the award in so far as it purports to direct the respondent to be emplaced in a position of employment which position he never held on 20 March 1975 is invalid as exceeding jurisdiction as are the consequential orders of the Industrial Court. The rest of the award is valid.

The application was granted accordingly on those terms.

Costs to the applicant.

Also found at [1982] CLJ 425